Friday, December 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

EDWARDES AND ANOTHER *v.* HUGHES AND ANOTHER.

Succession—Vesting—Marriage-Contract—Clause—Construction—Conditio si sine liberis.

In an antenuptial marriage-contract the wife conveyed a sum of £4000 to trustees. The deed provided that in the event of the marriage being dissolved by the predecease of the wife leaving children, the husband should have an alimentary liferent of this fund, that after his death the capital should be paid over to the children of the marriage on their attaining majority, and that if there were no children alive at the dissolution of the marriage, or should they all die before the terms of payment of their provisions as aforesaid, the husband should continue to have the liferent of the fund during his life, but that the whole capital should be subject to the wife's disposal by will. In the parallel clause which dealt with the event of the husband predeceasing the wife, it was provided that the wife should have an alimentary liferent of the fund; that after her death the interest was to be applied for behoof of the children during their minority, and that on their attaining majority the capital was to be paid to them, but subject to the declaration that if "such children should all die before their mother, or . . . should they all die before attaining majority, and without leaving issue of their own bodies," the fund should continue to be held for the alimentary liferent of the widow; and it was further declared that in the event of the wife surviving her husband, and of the failure of issue of the marriage, she should have the right to test on the capital. It was expressly provided that the provisions to children should not be payable, or become vested interests, or be transmissible by them until after the death of the longest liver of the spouses, and until the children attained majority.

The marriage was dissolved by the predecease of the wife, who was survived by one son, and left a will in which she made over all she possessed to her husband. In an action by the husband and son against the marriage-contract trustees, *held* (*diss.* Lord Adam, and *rev.* judgment of Lord Kincairney) that in the clause of the contract which dealt with the event of the wife predeceasing her husband, "children" could not be read as comprehending grandchildren, and that the pursuers were entitled to demand payment of, and could grant a valid discharge for the fund, in respect that it must eventually fall to one or other of them.

Lord Kincairney was of opinion that the *conditio si sine liberis* applied in the case of a marriage-contract.

Succession—Alimentary Provision—Discharge.

By antenuptial marriage-contract a wife conveyed a sum of £4000 to trustees. It was provided that in the event of the marriage being dissolved by the predecease of the wife, the trustees should pay the annual produce of the said fund to her husband "during his life, for his liferent and alimentary use only," and that the same should not be assignable by him or attachable for his debts, and that after his death the capital should be paid over to the children of the marriage on their attaining majority, and that in the event of there being no children alive at the dissolution of the marriage, or of their all dying before the terms of payment of their provisions, the wife should have the right to test on the capital, the trustees being empowered to pay over the capital at any time after the death of the wife and the failure of issue to the disponees under her will on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's settlement.

The wife predeceased her husband. She was survived by one son, and left a will, by which she made over everything she possessed to her husband.

In an action by the husband and son against the trustees under the marriage-contract for payment of the £4000 settled by the wife, *held* that the trustees were not bound to hold said fund on account of the husband's alimentary liferent, as it was not the intention of the deed that that liferent should be absolutely protected.

An antenuptial contract of marriage was entered into between Henry Stapleton Edwardes, M.D., and Miss Mary Jane Naish, afterwards Mrs Edwardes, on February 20, 1855. The first part of the marriage-contract set forth the obligations entered into by the husband. In the second part of the deed Miss Naish, on her part, gave to her intended husband a gift of £1000, and further disponed and conveyed to trustees therein named a sum of £4000 provided by her stepfather, and also the whole other estate which she presently possessed, or which she should acquire during the subsistence of the marriage (with the exception of the £1000 given to her intended husband), in trust for the following purposes—*First*, for payment to herself of the free annual income of the foresaid sum of £4000, and of the other means and estate conveyed for her alimentary use: "*Second*, that if the marriage happen to be dissolved by the predecease of the wife leaving a child or children of the marriage, the trustees shall pay the said free interest or annual produce to her said husband during his life, for his

liferent and alimentary use only, and with this declaration also, that the same shall not be assignable by him nor attachable for his debts or deeds, and the capital of the said sums and estate hereby conveyed shall be paid and made over to the said child or children at the first term after their father's death, and after their attaining majority in the case of sons, and in the case of daughters on their attaining majority or being married, as after mentioned: And if there are no children alive at the dissolution of the marriage by the wife's predecease, or though there should then exist a child or children of the marriage, in case of the death of all of them before the terms of payment of their provisions as aforesaid, the said interest or annual produce shall still be paid to the surviving husband during his life for his liferent and alimentary use as aforesaid, but the whole capital or fee shall be at and subject to the wife's disposal by will or other writing, whether executed according to the law of England or Scotland, and the said trustees, on the death of the surviving husband, shall be bound to convey or pay over the same to the disponees or assignees under any will or other writing which she may execute, and failing her executing any other such will or writing, then to her own nearest heirs and executors whomsoever, but with power to the trustees to convey or pay over the capital or fee of the said estate at any time after the death of the predeceasing wife and the failure of issue on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will or settlement, or of her heirs and executors failing her executing a will or settlement disposing of the said fee or capital: *Third*, in the event of the marriage being dissolved by the predecease of the husband, and that a child or children of the said marriage be then existing, the trustees shall pay the said interest or annual produce of the said income and estate, after deducting necessary expenses, to the said Mary Jane Naish during her life for her liferent and alimentary use only; and declaring that in this event also the same shall not be assignable by her or attachable for her debts or deeds, or the debts or deeds of any future husband she may marry; and after her death the trustees shall pay or apply the whole future interest or annual produce thereof to or for behoof of such child or children during their minorities after their mother's death, and the capital of the shares of the said children in the said sum of £4000, and their mother's other means and estate foresaid, shall be payable to them after her death on their respectively reaching majority in the case of sons, or in the case of daughters on their attaining majority or being married, whichever of these events shall first happen: But declaring always, that if such child or children should all die before their mother, or although they should survive her, should they all die before attaining majority, and without leaving issue of their own bodies, then and in that event the said sum of £4000, and other means and estate of the said Mary Jane Naish hereby conveyed, or what may be then remaining thereof, shall still continue to be held by the said trustees for the purpose of paying the free interest or annual produce thereof to the said Mary Jane Naish during her life, but for her liferent and alimentary use only, and exclusive always of the *jus mariti* or right of administration of any future husband the said Mary Jane Naish may marry as aforesaid, and declaring that the same shall not be assignable by her nor be liable to be attached for her debts or deeds, or for the debts or deeds of any husband she may marry: But declaring, nevertheless, that in the event of the said Mary Jane Naish surviving her said intended husband, and of the failure of issue of the said intended marriage, it shall be in the power of the said Mary Jane Naish to test upon and dispose of by will or other writing the capital or fee of the said sum of £4000 and other estate hereby conveyed by her in any way or manner she may think proper, to take effect after her decease, and the said trustees shall be bound to denude themselves of this trust, and to convey and make over at her death the said estate under their charge to the party or parties in whose favour she may have devised or left the same, and failing her leaving any such will or settlement, then the said trustees shall convey and make over the same to her heirs and executors."

It was further provided—"That . . . the foresaid provisions for the children of this marriage shall in no case be payable until the first term of Whitsunday or Martinmas after the death of the longest liver of their father or mother, nor whether before or after that period until they respectively attain the age of twenty-one years complete in the case of sons, or in the case of daughters until their attaining that age or being married, nor shall their provisions become vested interests or be transmissible by them until after the death of the longest liver of their father and mother, and after their respectively attaining majority if sons, or attaining majority or being married if daughters, which provision shall be divisible among the children if more than one, as the parents or survivor of them may by any writing under their hand direct, and failing such direction, equally among them."

The marriage which followed upon the execution of the above contract subsisted till 10th June 1862, when Mrs Edwardes died survived by her husband and one child—a son—Henry Frederick William Edwardes.

Mrs Edwardes left a will dated 17th April 1860, by which she made over to her husband absolutely all she then possessed or might thereafter possess by any ways or means.

The present action was raised by Dr Edwardes and his son H. F. W. Edwardes in November 1889 against Frederick Hughes and Francis Horwood, the trustees acting under the marriage-contract entered into between Dr and Mrs Edwardes, to have it declared that the pursuers had absolute right to the securities and sums of money representing the sum of £4000 settled by

Mrs Edwardes in the said contract of marriage, and to have the defenders ordained to transfer and pay the same to them on their joint discharge.

The pursuers averred that the pursuer H. F. W. Edwardes had no child or issue living, and that they were the only persons entitled to demand and receive transfer and payment of the sums sued for.

The pursuers pleaded—"(1) The pursuers being the only persons having a right or interest in the sums sued for, decree ought to be pronounced as concluded for."

The defenders denied that the pursuers were the only persons interested in the sums sued for, and pleaded—"(1) On a sound construction of the marriage-contract the term of payment has not yet arrived, and the action is premature. (3) The pursuers holding no present vested interest in the trust-estate, the discharge proposed to be granted would be insufficient and ineffectual."

On 6th June 1890 the Lord Ordinary (KINCAIRNEY) sustained the first and third pleas-in-law for the defenders, assoilzied them from the conclusions of the summons, and decerned.

"*Opinion.*—This is an interesting but a special case, and I do not think it is ruled by any of the cases which were referred to.

"The action is raised by Dr Edwardes and his only son against the trustees under Dr Edwardes' antenuptial marriage-contract, and it concludes for payment by the marriage-contract trustees of the money, amounting to £4000, settled by Mrs Edwardes by the marriage-contract.

"The marriage-contract was executed on 20th February 1855, and the marriage was dissolved by the death of Mrs Edwardes on 10th June 1862, survived by her husband and by a single child, the pursuer Henry Frederick William Edwardes, who is of course major, but who has no children.

"The first part of the marriage-contract bears that Dr Edwardes entered into certain obligations, which it is not necessary to examine. The second part of the deed sets forth that Mary Jane Naish, afterwards Mrs Edwardes, gives to her intended husband £1000; and it further bears that her stepfather Frederick Robert Hughes, who is a consenting party to the contract, 'presents and pays to her in the view of her marriage the sum of £4000, to be at same time put by her in trust as after mentioned.' Accordingly she, with consent of her stepfather Frederick Robert Hughes, dispones to trustees, *inter alia*, this sum of £4000.

"The provisions of the trust, so far as they bear on the events which have occurred, are these:—The trustees are directed (1) to pay to her the interest of her estate, exclusive of the *jus mariti*, and protected from the creditors of herself and her husband; (2) the second purpose provides for the event of the wife's predecease. It is provided that if she shall predecease leaving a child of the marriage, the trustees shall pay the interest of her estate to her husband during his life for his alimentary use, and not attachable for his debts; and it is provided that the capital shall be paid to the child or children at the first term after their father's death and on majority, and if there are no children alive at the dissolution of the marriage, 'or though there should then exist a child or children of the marriage, in case of the death of all of them before the terms of payment of their provisions as aforesaid, the said interest or annual produce shall still be paid to the surviving husband during his life for his liferent and alimentary use as aforesaid,' but the capital shall be at the wife's disposal by will or writing, and the trustees 'on the death of the surviving husband shall be bound to pay the same to the disponees or assignees under any will or other writing which she may execute, and failing her executing any other such will or writing, then to her own nearest heirs and executors whomsoever.'

"There follows a power to the trustees to pay the capital at any time after the death of the predeceasing wife and the failure of issue, on obtaining the consent and discharge of the surviving husband, the liferenter, and of the beneficiaries under the wife's will, or of her heirs and executors if she shall not leave a will.

"The third purpose of the trust provides for the event of the predecease of the husband. The provisions are similar to those in the second purpose, but although it is proper to consider them, still the event to which they relate not having happened, it is not necessary to advert to them further.

"The deed confers certain powers to make advances, and proceeds to declare, that with the exception of the power last above given to encroach upon a portion of the capital of their shares, the foresaid provisions for the children of the marriage shall in no case be payable until the first term of Whitsunday or Martinmas after the death of the longest liver of their father or mother, nor whether before or after that period until they respectively attain the age of twenty-one years complete, 'nor shall these provisions become vested interests or be transmissible by them until after the death of the longest liver of their father and mother, and after their respectively attaining majority.'

"These are the main provisions of the marriage-contract so far as bearing on existing circumstances, and it appears to me that there can be no serious doubt (1) that under that deed the only right conferred on Dr Edwardes, the husband, is an alimentary liferent, and that the trustees are directed to hold the funds for that liferent; (2) that no right has vested in the younger pursuer, the son; and (3) that the trustees are absolutely prohibited from paying the estate to the son while the father is alive. In the case of *Scott's Trustees* v. *Brown & Company*, May 19, 1882, 9 R. 798, a very similar deed was submitted to the Court for construction, and it was held that there was no vesting in the children till after the death of both father and mother. But in the present case the unambiguous and express declaration of the truster as to vesting seems to foreclose any question on the point.

"Further, I think it cannot be doubted that the ordinary condition *si sine liberis decesserit* is implied in this deed; that is to say, that it contains an implied institution in favour of the issue of the younger pursuer if he shall die without himself acquiring a vested interest in the estate.

"Mrs Edwardes left a will, executed at Alexandria on 17th April 1860, by which she made over to her husband in case of her death 'all I now possess and all I may hereafter possess by any ways or means, or whatever moneys or other property may be left me by any relatives or friends, or money or moneys, property, personal property, ships or ship, my husband is to have the power of the whole in his hands, so that he may do what he likes with them, and make over them in his will to anyone he wishes.'

"This will makes no mention of the settled fund over which Mrs Edwardes had the power to test which has just been mentioned. But it was not, and I think could not be disputed that the will carried the settled funds, although not specially mentioned, if Mrs Edwardes had power to bequeath them—*Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413; *Grierson* v. *M'Leod or Miller*, July 3, 1852, 14 D. 939.

"The marriage-contract is somewhat obscurely expressed on this point, but there seems to be no doubt that it contemplates a will by the wife during the subsistence of the marriage, which might be effectually made although there should be children of the marriage then existing, but which could not of course defeat the rights of children under the marriage-contract.

"In these circumstances it has been contended for the pursuers that they have the whole *jus exigendi* in the funds in question, that if the father shall predecease the son the right will vest in the son, while if the father be the survivor the funds will be immediately payable to him under his wife's will, and that their joint discharge will therefore completely exoner the trustees. They referred to *Robertson* v. *Davidson*, November 24, 1846, 9 D. 152; *Pretty* v. *Newbigging*, March 2, 1854, 15 D. 667; *Grant* v. *Grant's Trustees*, January 4, 1876, 3 R. 280; *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H. of L.) 217; *Lawson's Trustees* v. *Dicksons*, June 19, 1886, 13 R. 1003.

"In reference to the alimentary character of Dr Edwardes' right, the pursuers referred to the proviso at the close of the second purpose of the trust as showing that it was not the truster's intention that this right of liferent should enjoy an absolute protection. It was maintained that the consent of the younger pursuer was equivalent to his death or non-existence, so as to let in the operation of the proviso.

"The trustees maintained that they were bound to continue to hold the funds, (1) in respect of the alimentary character of Dr Edwardes' liferent, and they referred to *Balderstone* v. *Fulton*, January 23, 1857, 19 D. 293; *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 630; *White's Trustees*, June 1, 1877, 4 R. 786; and *Duthie's Trustees*, 1878, 5 R. 858; (2) because no right had vested; (3) because they were bound to hold for the eventual interest of the possible issue of the younger pursuer.

"Had the circumstances in which under the marriage-contract Mrs Edwardes' power to test on the settled funds was to arise occurred—that is to say, had there been no living issue of the marriage—I would have been inclined to hold that Dr Edwardes would have been entitled to demand the funds, and that the trustees could not have resisted that demand on the ground that they were bound to hold in order to protect Dr Edwardes' alimentary liferent. I should have come to that conclusion on account of the wide and absolute terms in which Mrs Edwardes' will is conceived, and on account of the terms of the proviso which has been referred to, and if the provision as to that alimentary liferent had been the trustees' sole ground of defence, I rather think I should have held that it could be overcome.

"But I have come to the conclusion that the other defences of the trustees ought to prevail. I think that in all the cases quoted for the pursuers where trustees have been directed or authorised to denude on the joint application of a liferenter and of the person to whom the fee stood destined the right to the fee was held to have vested, and that that has always been held to be essential in such cases. In the case of *Latta* v. *Muirhead*, December 23, 1887, 15 R. 254, anticipation of the term of payment of the fee was authorised only because the fee was held to have vested. But that judgment has been overruled in the House of Lords, on the ground, I understand, that it was held that the fee had not vested. Here the fee has certainly not vested in the son, and although the view seems maintainable that a defeasible fee may have vested in the husband, that appears to be very doubtful indeed, and would not in any view bring the present case within the scope of the authorities quoted. The dilemma put by the pursuers from which they concluded that the funds must certainly be payable to one or other of them, seems to overlook the consideration that the son may predecease the father leaving issue, which issue would, I apprehend, take the fund and exclude the husband—Fraser on Husband and Wife, ii. 1379. Suppose that in this case the fee had not been destined to children but to grandchildren, it appears to me that the trustees would be bound to hold so long as the possibility of grandchildren existed. I do not see that a provision to a child with the special declaration that it shall not vest in the circumstances which have happened can make a difference if I am right in thinking that a conditional institution in favour of grandchildren is implied. No means were suggested by which, if the funds were paid to the pursuers, the eventual rights of the possible issue of the younger pursuer would be preserved, and they might be totally destroyed, contrary to what I hold to be the implied provision of the marriage-contract.

"On the whole, I am compelled to conclude that the pursuers have not established their right to payment, and that the trustees are in the right in their contention that they are entitled and bound to continue the trust."

The pursuers reclaimed, and argued—The *conditio si sine liberis* only applied to children and not to grandchildren, and did not apply in the case of marriage-contracts. In the present case it was also excluded by the terms of the clause under consideration. "Children" in clause second could not be held to include the issue of children, especially as clause third contained an express stipulation in favour of such issue. The necessary inference was that the absence of any mention of issue in clause second was clearly meant to exclude them in favour of the persons who might be nominated by the wife under her settlement—*Rhind's Trustees* v. *Leith and Others*, December 5, 1866, 5 Macph. 104, *per* Lord Cowan, 110; *Young's Trustees* v. *Macnab*, July 13, 1883, 10 R. 1165. If the *conditio* did not apply, the pursuers were the only persons who could ever have a right to the fund in question, and one or other of them must eventually take it. In these circumstances their joint discharge would sufficiently exonerate the trustees.—*Latta* v. *Muirhead*, December 23, 1887, 15 R. 254, and May 12, 1890, 17 R. (H. of L.) 45, *per* Lord Watson, 48. The ground of the House of Lords' judgment in *Muirhead's* case was that the pursuers there might have eventually turned out not to be the persons entitled to take in terms of the deed. That was not the case here, as one or other of the pursuers must take the fee. Perhaps the correct view was that the fee was in the father, subject to defeasance in favour of the son. If the pursuers' argument so far was sound, the alimentary liferent given to the elder pursuer was no bar to the trustees' denuding. The deed provided for the discharge of that right in the event of the failure of children. There was accordingly no absolute protection given to the right of liferent, and the consent of the only surviving child might be taken as the equivalent of his death or non-existence. Payment of the larger right of fee would discharge the lesser right of liferent—*Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858; *Jamieson* v. *Leslie's Trustees*, June 19, 1888, 16 R. 807; *Pretty* v. *Newbigging*, March 2, 1864, 16 D. 667.

Argued for the defenders and respondents—Neither of the pursuers had a vested right in the fund claimed, and in the absence of such vested right could not demand payment. The pursuers' suggestion that there was a vesting subject to defeasance in the father was not enough—*Latta* v. *Muirhead, supra*. The son could neither assign nor renounce his right, as it was distinctly declared not to be transmissible during his father's lifetime. Further, neither of the pursuers might ever take a vested right in the fund, as there was an implied gift to the issue of children. The *conditio si sine liberis* was not excluded in the case of marriage-contracts—*Robertson* v. *Houston*, May 28, 1858, 20 D. 989; *Arthur & Seymour* v. *Lang*, June 30, 1870, 8 Macph. 928. Nor was it excluded by the terms of the deed. The word "children" in the clause dealing with the event of the wife's predecease should be read as including grandchildren. The reference in the clause dealing with the event of the wife's survivance to the failure of the issue of children showed that in the view of the contracting parties such issue had been already called by implication in the provision to children. If "children" included grandchildren in that clause, why not in the clause dealing with the event of the husband's survivance? The very fact that the issue of children were called in the one event suggested that they were meant to be called in the other. A further valid objection to the claim of the pursuers was that the trustees were bound to hold the settled fund, as long as there was a child of the marriage in existence, for payment of the alimentary liferent to the elder pursuer, and that he could not validly discharge his right to that liferent—*White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786.

At advising—

LORD PRESIDENT—The question depends on the construction and legal effect of the settlement of a sum of £4000 in the marriage-contract of the leading pursuer Dr Edwardes and his now deceased wife. The £4000 was part of the estate of Mrs Edwardes, and she conveyed the sum to the marriage trustees for the purposes (1) to pay the interest to the wife during the subsistence of the marriage for her alimentary use; (2) on the dissolution of the marriage by the predecease of the wife to pay the interest to the surviving husband for his alimentary use, excluding creditors and assignees; (3) on the death of the surviving husband to pay over the capital to the child or children on the sons attaining majority and the daughters attaining majority or being married; (4) on the failure of children when the term of payment arrives, the husband's alimentary liferent is to continue, and the fee is to be at the disposal of the wife by will, and failing her executing a will is to pass to her nearest heirs and executors.

The pursuers are the surviving husband and the only child of the marriage, Mr Henry Frederick William Edwardes, and their demand against the trustees as defenders is that they shall pay over to the pursuers on their joint discharge the whole sums in their hands representing the original settled fund of £4000.

The defences substantially resolve themselves into two grounds of objection to the pursuers' demand.

In the first place, the defenders maintain that they are bound to uphold the trust for the protection of the alimentary liferent of the surviving husband, the leading pursuer. But the position of Dr Edwardes is peculiar. Mrs Edwardes, who died in 1862, made a will on the 17th April 1860, leaving her whole estate to her husband

absolutely. In these circumstances there can be no doubt that if there was no surviving child of the marriage the surviving husband would be entitled to demand an immediate conveyance of the fee, for the trustees are empowered to pay over the whole capital "at any time after the death of the predeceasing wife and the failure of issue on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will or settlement, or of her heirs and executors failing her executing a will." The only obstacle to the application of this clause is the existence of the other pursuer Henry Frederick. But the clause just quoted shows that there was no intention to maintain the trust in all events merely for the security of the alimentary liferent, and if all parties interested, the surviving husband and the only child, are desirous to put an end to the trust and obtain a conveyance of the fee, it appears to me that the principle, if not the letter, of the clause is clearly applicable.

In the view of the case hitherto considered the only parties who have any interest in the fund are the two pursuers. If the father predecease the son, the son becomes absolute fiar as institute under the marriage settlement. If the son predecease the father, then the father takes as absolute fiar under the wife's will, unless the son leaves issue, and that issue has right under the marriage-contract to take the fee as institute in place of his deceased father.

This gives rise to the second defence pleaded by the trustees, that though the children of the marriage should all die before their shares become vested and payable, yet if any of the deceasers leave issue, the issue shall take in place of the parents, and as Henry Frederick may still marry and leave issue, the trustees are bound to hold in the prospect of such a contingency.

The decision of this question must depend on whether the term "children" in the clause applicable to the events which have occurred can be read as including "grandchildren." Confining my attention to the words of the clause itself, I should think the question one of some delicacy, but am disposed to construe the term strictly as not including grandchildren.

But any doubt as to this construction is, I think, removed by the light to be derived from another clause of the settlement, which provides for the event of the marriage being dissolved by the predecease of the husband. In that event the widow is to enjoy an alimentary liferent of the whole fund of £4000; after her death the interest is to be applied for behalf of the children during their minority, and on majority or marriage (in case of daughters) the capital is to be paid over to them. But this clause is followed by an important declaration, "that if such child or children should all die before their mother, or although they should survive her, should they all die before attaining majority and without leaving issue of their own bodies," then the fund shall continue to be held by the trustees for the alimentary liferent of the widow, "but declaring nevertheless, in the event of the said Mary Jane Naish surviving her said intended husband and of the failure of issue of the said intended marriage," it shall be in the power of the widow to test on the capital.

The contrast between this and the clause applicable to the predecease of the wife is very remarkable. In the latter the only parties entitled to the fee as institutes are "children." In the latter the grandchildren are conditionally instituted to their parents, and the widow's right to test is made dependent not on the failure of children but on the failure of issue of the marriage—a term of more elastic signification than children, and including descendants of any generation if the natural meaning is not controlled by the context.

Construing the deed as a whole, I am of opinion that the word children in the clause applicable to the event of the wife's predecease cannot be read to comprehend grandchildren or issue of children.

On both grounds of defence I feel myself obliged to differ from the Lord Ordinary, and to give judgment in favour of the pursuers.

I think it right to add that in disposing of this case I have not found it necessary to consider, and I have not considered, whether the *conditio si sine liberis decesserit* applies to a provision in a marriage-contract

LORD ADAM—This action is raised by Dr Edwardes and his only son against the trustees acting under the marriage-contract of Dr and Mrs Edwardes to have the sum of £4000, settled by Mrs Edwardes in the said contract of marriage, with the interest accrued thereon, paid over to them.

The case is a peculiar one, because it is admitted that Dr Edwardes has no vested right in this fund, and it is equally admitted that his son has no vested right in it either. But the proposition is, that although neither of the pursuers has such a right separately, the two together can validly discharge it.

It is said that if the father survives the son the whole fee must vest in the father, and, on the other hand, if the son survives the father the whole fee necessarily vests in the son, and that in any possible event vesting must take place either in the father or in the son, and that although at present there is a vested right in neither, by combining they can give an indefeasible discharge to the trustees. The case, as I have said, is a peculiar one, and if the question only depended on the considerations to which I have referred, I could not say that the pursuers could not give a valid discharge to the trustees. But there is this further consideration—Is it true on a construction of the marriage-contract that in every event vesting must take place in either the father or the son? The Lord Ordinary says not, because he says that the *conditio si sine liberis* applies. If that be so, the issue of children of the marriage are by the contract made conditional insti-

tutes, and in that case Dr Edwardes' son may predecease him, leaving issue who may survive Dr Edwardes and take a right to the settled fund. It therefore does not follow in that view of the contract that on his son's death Dr Edwardes could give a valid discharge to the trustees.

In the construction which your Lordship has put upon this contract, and which I understand is also adopted by Lord M'Laren and Lord Kinnear, it has not been necessary to decide whether the *conditio si sine liberis decesserit* would apply in the case of a deed of this kind. It appears to me to be a nice question, and I have not made up my mind upon it, as the opinion which I am about to pronounce on the construction of the contract is not to be an operative judgment. I shall therefore only state the reasons why I differ from your Lordship on the construction of the marriage-contract, and I am not to be taken as saying that in all cases the *conditio si sine liberis* is applicable to marriage-contracts. Assuming, however, as I must assume, that in this matter marriage-contracts are in the same position as testamentary settlements, I think that in the second clause of the second part of the contract the issue of children are conditionally instituted.

The question turns principally upon the construction of this second clause. In the first the trustees are directed to pay to the wife the interest of her estate during the subsistence of the marriage. In the second it is provided that if the wife predeceases her husband, leaving a child or children of the marriage, "the trustees shall pay the said free interest or annual produce to her said husband during his life for his liferent and alimentary use only, and with this declaration also, that the same shall not be assignable by him nor attachable for his debts or deeds; and the capital of the said sums and estate hereby conveyed shall be paid and made over to the said child or children at the first term after their father's death, and after their attaining majority in the case of sons, and in the case of daughters on their attaining majority or being married, as after mentioned; and if there are no children alive at the dissolution of the marriage by the wife's predecease, or though there should then exist a child or children of the marriage, in case of the death of all of them before the terms of payment of their provision as aforesaid, the said interest or annual produce shall still be paid to the surviving husband during his life for his liferent and alimentary use as aforesaid, but the whole capital or fee shall be at and subject to the wife's disposal by will or other writing." Now, the wife has, in exercise of the power so given her, executed a will in favour of her husband—the pursuer Dr Edwardes—and that, it is said, gives him the right which he claims in this action. It is quite clear, even from the terms of the clause I have read, that the son has no vested interest in the provisions to children, because payment of these provisions is made conditional on his surviving his father, but in another clause of the deed it is specially provided that the children shall have no vested right "until after the death of the longest liver of their father and mother." It is therefore quite clear on the construction of this part of the deed that the son has at present no vested right in the provisions in favour of children, and it is equally clear that although the husband may acquire the right to the settled fund under his wife's settlement he has no vested right as yet in that fund, and hence arises the question we have to decide.

Now, I think that where the clause directs that the capital of the estate shall be paid over to the child or children of the marriage the *conditio si sine liberis* applies, and the meaning of the words used is the same as if the capital had been directed to be paid over to children, whom failing their issue; and I do not understand that your Lordship would be of a different opinion except for the existence of another clause which gives to the word "children" a more restricted meaning.

The clause to which your Lordship referred is the parallel clause to that which relates to the provisions made in the event of the wife's predecease, and deals with the event of the husband predeceasing his wife. It provides that in that event the widow shall have a liferent of the estate, and that "after her death the trustees shall pay or apply the whole future interest or annual produce thereof to or for behoof of the child or children of the marriage" during their minorities after their mother's death, and the capital of the shares of the said children in the said sum of £4000, and their mother's other means and estate foresaid, shall be payable to them after her death on their respectively reaching majority in the case of sons, or in the case of daughters on their attaining majority or being married. Had there been nothing more said it appears to me that this clause would have been framed in the same manner as the second clause, and I should have said that in this clause also the conditional institution of the issue of children was to be implied. So far as I can see, the two clauses are in entire harmony up to that point. But it is said that in the following lines the contracting parties show that they are using the word "children" in a limited sense, and so exclude the application of the *conditio si sine liberis*. The deed proceeds thus —"Declaring always, that if such child or children should all die before their mother, or although they should survive her, should they all die before attaining majority and without leaving issue of their own bodies," the mother may dispose of the estate by will. It is said that because there is a nomination of issue there, which implies a gift to the issue of the wife, therefore in construing the contract, when the bare word "children" is used in the second clause we can only give it a restricted meaning, or, in other words, that where the parties mean to include the issue of children they express themselves to that effect.

I should have felt the force of that observation if in the third clause, where the

trustees are directed to pay over the capital to the children of the marriage, the words "whom failing to issue" had been added—I should then have felt the force of the observation that the word "children" standing alone was meant to have only a limited meaning; but that does not seem to me to be the proper meaning of the words here used—"But declaring always, that if such child or children should all die before their mother, or although they should survive her, should they all die before attaining majority and without leaving issue." It appears to me that the way in which the language is used assumes a previous gift to the issue of children. It is clear that that part of the clause necessarily proceeds on a supposition in the minds of the parties that in calling "children" they had called also the issue of children. So it does not appear to me that the existence of the words "without leaving issue," in the place where they occur, has the effect of showing that the parties when they used the word "children" in the previous part of the deed necessarily meant to exclude the issue of children. It rather shows that the parties to the contract assumed that the issue of children would take under the general word "children," and then proceeded to provide for the event of the children dying, and dying without issue.

That is my construction of the contract, and these are the reasons why I differ from your Lordship. Though it will have no operative effect, I have thought it right to state what my opinion on the construction of the contract is.

LORD M'LAREN—I concur in the opinion of your Lordship as regards the construction of the marriage-contract, in which you point out that there is such a difference of phraseology in the two branches of the destination that we can only conclude, that supposing the *conditio si sine liberis* were otherwise applicable, it is excluded under this deed.

I quite appreciate the argument suggested by Lord Adam upon the words in question, that where a testator refers to the contingency of death without issue, it is to be taken as an implied gift to issue in the event of their surviving their parents. That is a well-known rule of construction recognised in the law of England and Scotland in the construction of wills and settlements, and it is not confined to cases of destinations to children or to persons to whom the testator is *in loco parentis*. It does not appear to me that the existence of the rule ought to influence the construction of the main question here, because the construction founded on the words referring to death without issue must be confined to the branch of the deed in which the words occur, and is not to be referred to that branch of the destination in which children alone are mentioned without any reference to remoter issue.

In coming to this opinion I of course proceed on the assumption that the *conditio* is applicable, but it is an assumption made merely for the purpose of argument. It is a condition of the question of construction here raised. I desire to reserve my opinion as to the application of the *conditio* to a marriage-contract. I think this is a question which ought to receive further consideration when a case occurs properly raising it. There is no presumption that the parties to a marriage-contract intend to provide for any persons except those having legal claims upon them, and in such a case it can hardly be said that the conditional institution of grandchildren is within the scope of the deed.

LORD KINNEAR — I agree with your Lordship. I cannot say that I should be able to come to the same conclusion if I thought that the right to the money settled under this contract had vested in neither of the pursuers. It appears to me, for the reasons stated by your Lordship, that the money belongs to one or other of them, though at present we cannot tell whether to the father or the son. That cannot be ascertained so long as they are both in life. But in the meantime, as both unite to demand payment, no difficulty arises from the impossibility of foreseeing in which of the two the right may ultimately be found to be vested.

The only difficulty I have felt in coming to that conclusion arises from the view which Lord Adam has explained, but I am unable on consideration to give to the words to which he referred the same effect as he ascribes to them. The view, as I understand it, is this—that in that part of the contract which deals with the event of the husband's predecease, the contracting parties have furnished a glossary for the construction of the word "children," by the aid of which it must be interpreted to exclude grandchildren, both in that provision and in other parts of the deed.

I admit that there is a great deal of force in that argument as a criticism on the logical structure of the sentence, but I am not sure, even if I were construing that part of the contract alone without reference to any other part, that I could construe it in the same way as Lord Adam has done, because the language used is a very common form for making a conditional institution of the children of primary legatees, and it frequently occurs in the case of testamentary deeds where the provisions are in favour of strangers, or of children in such circumstances as make the *conditio si sine liberis* inapplicable. Accordingly, I am not sure that it is a sound construction of this part of the contract to say that where the framers of the instrument provide for the failure of children "without leaving issue of their bodies," they must have had in their minds a distinct conception that the issue of children had previously been called by implication.

But if that were doubtful I think it would be quite impossible, according to the ordinary rules for the construction of written instruments, to disregard the difference between the provisions of the deed dealing with the event of the wife's predecease, and those dealing with the event of the

husband's predecease; and I do not know that, even on the question of construction, it is immaterial to observe that this is not a will but a marriage-contract, in which the wife is settling funds on the children of the marriage, but is also stipulating for the right of disposing of these funds at her own pleasure in the event of there being no children. When the wife in making a settlement of this kind stipulates that she shall be entitled to dispose of the funds by will, in one event if there are no children of the marriage, and in another event if there are no children or issue of children, I cannot on the ordinary principles of construction suppose that she does not intend to distinguish between the two cases. It is not necessary to speculate as to her reasons for making such a distinction. She has stipulated for an absolute right of disposal in the event of her predeceasing her husband and there being no children of the marriage, and it appears to me that the contrast between this clause and the later clause only goes to enforce the obligation of abiding by the literal interpretation of the words used in each.

On the question of construction, therefore, I agree with your Lordship, and I also agree that it is unnecessary to determine the larger question whether the *conditio si sine liberis* can properly be applied to the construction of a marriage-contract in any case. But I desire to add that if the rule were applicable at all, of which I am not satisfied, it appears to me to be very questionable whether such a provision, if it should be held to include grandchildren, may not be testamentary, and therefore revocable in so far as their interests are concerned, although it would certainly be pactional in so far as regards the immediate children of the marriage.

The Court recalled the interlocutor of the Lord Ordinary, decerned in terms of the conclusions of the summons, and appointed the expenses of both parties to be paid out of the trust funds in the hands of the defenders.

Counsel for the Pursuers—Rankine—Wilson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Defenders—M'Kechnie—Peddie. Agents—Macandrew, Wright, & Murray, W.S.

Saturday, December 20.

FIRST DIVISION.

ALLAN AND OTHERS *v.* WHYTE AND OTHERS.

Property—Dean of Guild—Glasgow Police Act, secs. 367, 370—*Free Space.*

The Glasgow Police Act, by sec. 367, provides that "The Dean of Guild shall not grant warrant to erect or alter any building unless or until he is satisfied . . . that every apartment, except those distinguished on the plan as not intended to be let or used for sleeping in, is of such size, and has one or more windows, with such free space in front of every window thereof, as to be in conformity with the provisions hereinafter contained;" and by sec. 370 certain regulations are prescribed for determining the necessary free space in each instance, but there is no provision that the free space required must extend over the exclusive property of the builder.

In an application for a lining, it appeared from the plans that while the necessary free space in fact existed, it was obtained only by adding to the free space over the builder's own property that which existed over unbuilt-on ground belonging to neighbouring proprietors; and the Dean of Guild thereupon refused a lining, "in respect the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (secs. 367 and 370) to entitle him to use the room or kitchen, marked A on said plans, as a sleeping apartment." An appeal from this decision was *sustained*, but *observed* that the case would be different if there was an immediate prospect of building upon the unoccupied space of the neighbouring proprietor.

Dean of Guild—Refusal of a Lining—Competency of Appeal—Glasgow Police Act, secs. 277, 273.

Held that a process of lining in the Dean of Guild Court was a common law proceeding, and therefore that the right to review the judgment of the Dean of Guild therein was specially reserved by sec. 273 of the Glasgow Police Act, and not excluded under sec. 277.

This was an appeal by G. & G. Allan, builders, Glasgow, and George Allan and Gavin Allan, the individual partners of that firm, and William G. Wilson, also a builder in Glasgow, against a decision of the Dean of Guild of the city of Glasgow. The appellants were proprietors of certain subjects situated upon the west side of Armadale Street and south side of Garthland Drive, Dennistoun, Glasgow, and they proposed to erect upon their property certain buildings, the plans of which were duly lodged in the Dean of Guild Court with a view to a lining being obtained. The petition to the Dean of Guild was upon 4th October 1890 ordered to be intimated to the neighbouring proprietors, but none of these appeared to oppose the application. The Dean of Guild, however, on 28th October pronounced the following interlocutor:—"Having resumed consideration of this case and relative plans, as now amended, and heard the agent for the petitioner, in respect the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (secs. 367 and 370) to entitle him to occupy the room or kitchen, marked A on said plans, as a sleeping apartment: Refuses the lining craved, reserving to the petitioner to renew